PARTIES:	ROBIN LAURENCE TRENERRY
	v
	MATTHEW ROBERT BRADLEY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CASE STATED
FILE NO:	JA 64 of 1996
DELIVERED:	20 JUNE 1997
HEARING DATES:	11 APRIL 1997, 12 JUNE 1997
JUDGMENT OF:	MARTIN CJ, ANGEL AND MILDREN JJ

CATCHWORDS:

Special Case Stated - S 162 *Justices Act* - S 21 *Supreme Court Act* - Statutory Interpretation - Mandatory Sentencing Regime - S 78A and s 78B *Sentencing Act* - the use of the Heading of a provision for interpretative purposes - discretionary mitigatory provisions - whether the court is precluded from wholly or partially suspending a sentence - whether the court can order a non-parole period - effect of Hospital Orders s 80 *Sentencing Act* - meaning of "actually serve the term of imprisonment" - meaning of the term "release" - second reading speech as an aid to interpretation - principles of interpretation where provisions are meaningless - Effect of s 78B(2) on s 78A - principles whereupon the court inserts words into a provision - Fundamental duty of a court in sentencing - Just sentences.

Legislation:

Supreme Court Act
Justices Act
Sentencing Act
Criminal Code
Interpretation Act (NT) (1978)
Parole of Prisoners Act (NT) (1971)
Great Charter of King John (1215) (*Magna Carta*)
Bill of Rights 1688

Cases:

Silk Bros Pty Ltd v State Electricity Commission of Victoria (1943) 67 CLR 1 applied.
Cobiac v Libby (1968) 119 CLR 257 applied.
Sillery v The Queen (1980-81) 180 CLR 353 applied.
Beckwith v The Queen (1976) 135 CLR 569 followed.
Pratt v South Eastern Railway Co [1897] 1 QB 718 considered.
Duport Steel v Sirs [1980] 1 WLR 142 considered.
Kirkness v John Hudson & Co Ltd [1955] AC 696
Coco v The Queen (1994) 179 CLR 427 approved.
Palling v Corfield (1970) 123 CLR 52 approved.
Vacher & Sons Ltd v London Society of Compositors [1913] AC 107 approved.
The Engineers' Case (1920) 28 CLR 129 approved.
Thompson v Goold & Co [1910] AC 409 followed.
Vickers, Sons & Maxim Ltd v Evans [1916] AC 444 followed.
Salmon v Chute and Dredge (1994) 4 NTLR 149 approved.
Maynard v O'Brien (1991) 78 NTR 16 approved.
Bolton & Anor; Ex Parte Beane (1987) 162 CLR 514 considered.
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1980-81) 147 CLR 279 followed.

Texts and Articles:

Professor N Morris, *Sentencing and Parole* (1977) 51 ALJ 523
Pearce and Geddes, *Statutory Interpretation in Australia*, 4th Edition para 2.12.

REPRESENTATION:

Counsel:

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Respondent:	A Wyvill, S Cox

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	Withnall Cavanagh Maley

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IN THE FULL COURT OF THE
SUPREME COURT OF THE
NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA 64 of 1996

BETWEEN:

ROBIN LAURENCE TRENERRY
Appellant

AND:

MATTHEW ROBERT BRADLEY
Respondent

CORAM: MARTIN CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 20 June 1997)

MARTIN CJ

The question in this matter comes to the Court upon referral by a Judge pursuant to s21 of the *Supreme Court Act* (NT) 1979. It arose by way of a special case stated under s162 of the *Justices Act* (NT) 1928. The failure to utilise the procedure prescribed in O64 of the *Supreme Court Rules* (NT) 1987 has caused some difficulty in this particular case, given the way in which the

argument proceeded and it may avoid inconvenience, cost and delay if the rule is adhered to.

There should be additions and alterations to the question put, which make it as follows:

> "Whether upon the true construction of SS 78A and 78B of the *Sentencing Act*, a court is precluded from:
>
> (a) making orders wholly or partially suspending a term of imprisonment ordered to be served under S 78A;
>
> (b) making an order suspending a term of imprisonment ordered to be served under S 78A upon the offender entering into a home detention order;
>
> (c) fixing a period during which an offender ordered to serve a sentence of imprisonment under S 78A is not eligible to be released on parole.
>
> and in each case where the sentence ordered to be served is:
>
> (i) the minimum fixed by S 78A, or
>
> (ii) a period in excess of the minimum fixed by S 78A".

The questions are important, going to the heart of amendments to the *Sentencing Act* (NT) 1995 ("the Act") which came into operation on 8 March 1997 in the following form:

> "*Division 6 - Custodial Orders for Property Offenders*
>
> *Subdivision 1 - Compulsory Imprisonment*
>
> 78A. IMPRISONMENT FOR PROPERTY OFFENDERS

(1) Where a court finds an offender guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days.

(2) Where a court finds an offender guilty of a property offence and the offender has once before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 90 days.

(3) Where a court finds an offender guilty of a property offence and the offender has 2 or more times before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 12 months.

(4) Where an offender is found guilty of more than one property offence specified in the same information, complaint or indictment, the findings of guilt are, for the purposes of this section, to be taken as a single finding of guilt, whether or not all the offences are the same.

(5) Where an offender is found guilty of more than one property offence as part of a single criminal enterprise, all the property offences are together a single property offence for the purposes of this section, whether or not the offences are the same.

(6) Where an offender is found guilty of a property offence, the offence is to be taken into account for the purposes of subsection (2) or (3) whether it was committed before or after the property offence in respect of which the offender is before the court.

78B ADDITIONAL ORDERS FOR PROPERTY OFFENDERS

(1) In addition to the order required to be made under section 78A, the court may make a punitive work order or any other order it may make under this Act.

(2) An order referred to in subsection (1) cannot be made if its effect would be to release the offender from the requirement to actually serve the term of imprisonment ordered under section 78A."

The respondent pleaded guilty before the Court of Summary Jurisdiction sitting in Darwin for that on 12 March 1997 he unlawfully entered a building, contrary to s213 of the *Criminal Code* (NT) 1983 for stealing contrary to s210

and for unlawful damage contrary to s251. All of those offences are within the definition of "a property offence". The following facts are admitted:

> "On the 12th March 1997 the defendant rode his bicycle from his residence to the oval area of the Millner Primary School. Leaving his bicycle there he climbed the wire fence into the Jape complex. From there he went to the front door area of Toy World. The defendant used a baseball bat that he brought with him to strike a glass window smashing it and causing damage referred to. The defendant cleared away the glass and then placed a rubber mat over the broked (sic) glass, so that he could climb into the premises without cutting himself. Once inside the defendant went to where the Game Boys are located. He stole 5 Game Boys, these having a total value of $495.00. He then stole 9 yoyos and a boogie board before leaving the store with the items and he rode home.
>
> On the 17th March the defendant was at the Berrimah Police Station with his father where he handed back all the items that he had stolen. He took part in a record of interview and made full admissions in relation to the offences. When asked for a reason for this actions his reply was "I don't really know".

The special case correctly says that the three offences being specified in the same information, the application of S 78A(1) and (4) would result, upon a finding of guilt, in a conviction being recorded and an order that the offender serve of a term of imprisonment for not less than 14 days.

Counsel for the respondent before that court submitted that any sentence of imprisonment imposed should, in the light of the respondent's age, 17, lack of prior convictions, plea of guilty, remorse, restitution and other personal circumstances, be fully suspended.

Issues relating to the sentencing of offenders are often times contentious and it is for the Parliament, taking into account the sentencing powers already conferred by legislation and the discretions available to the judiciary to decide, as a matter of policy, whether and to what extent the statute or the discretions should be varied. There may be a large number of options for change available and the extent to which any change has been wrought is to be gauged by the courts. In performing that task courts apply principles well known to the Parliament. Amending legislation generally takes its place in the Act as amended, as a whole, and is construed in that context. At first blush, the issues raised in the stated case appear to be capable of straightforward, non-contentious and ready solution. However, as the submissions for the parties reflected in these reasons disclose, that is far from being so. That was inevitable, given the open conflict between the established order of sentencing considerations, developed upon the basis of judicial discretion within a particular statutory framework, and discriminatory legislation boldly entitled "Compulsory Imprisonment". Parliament expects that any Act which apparently intrudes upon the established rights of people before courts exercising criminal jurisdiction will be closely scrutinised to determine the extent to which, if any, those rights have been adversely affected by the will of the people expressed in the words enacted by the Parliament. It is in that context that phrases such as "irresistible clearness"; "unmistakable and unambiguous intention"; "express authorisation" and the like find their place. Approaching the matter in this way is not to raise the false image of a contest

between the Parliament and the courts. It is to do no more than reiterate and apply principles long established and well understood by both institutions which together provide the essential foundation for a well ordered democratic society.

The amendments appear under the heading "Compulsory Imprisonment". It is part of the legislation for interpretative purposes (s55(1)) of the *Interpretation Act* (NT) (1978) and can be used as an aid to that interpretation per Latham CJ. in *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at p16:

> "The headings in the statute or in regulations can be taken into consideration in determining the meaning of a provision where that provision is ambiguous, and may sometimes be of service in determining the scope of a provision."

To introduce a mandatory sentencing scheme leading to compulsory imprisonment, Parliament must do so clearly and explicitly. Windeyer J. in *Cobiac v Liddy* (1968) 119 CLR 257 at 269 for example said:

> "The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy. The more strict a rule is made, the more serious become the consequences of breaking it, the less likely it may be that Parliament would intend to close all avenues of exception. Especially when penalties are made rigid, not to be reduced or mitigated, it might seem improbable that Parliament would not retain a means of escaping the imposition of a penalty which must follow upon conviction, that it would abolish it, not directly but by a side wind. That is not because mercy, in Portia's sense, should season injustice. It is that

> a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice."

Reference might also made to *Sillery v The Queen* (1980-81) 180 CLR 353, a case concerning whether the prescribed penalty was a maximum or a mandatory punishment. Gibbs CJ. at p357 said: "If it is intended to provide a mandatory penalty, clear words can and should be used." Murphy J. at p359 said:

> "The general presumption is that legislation affecting the liberty of the person is to be construed favourably to the person ... If the penalty is mandatory, the draftsman has contravened an elementary principle of drafting by requiring the imposition of the same penalty for different offences which are not of the same nature and gravity."

With respect, whether the draftsman has made such an error depends upon the instructions given to him or her. In *Beckwith v The Queen* (1976) 135 CLR 569, Gibbs J. at p576 affirmed that the ordinary rules of construction must be applied in determining the meaning of a penal statute, but if the language of the statue remains ambiguous or doubtful, then the ambiguity or doubt may be resolved in favour of the subject.

Subparagraphs (g), (h) and (j) of s7 of the *Sentencing Act* empowers the court to make sentencing orders that an offender serve a term of imprisonment. In doing so a court is to pay regard to a number of factors, including the maximum and any minimum penalty prescribed, (s5(2)(a)). In relation to

"property offences", as defined, S 78A requires that there be a recording of a conviction, an order that the offender serve a term of imprisonment and that that term of imprisonment be not less than the minimum prescribed in the various circumstances set out in subs(1), (2) and (3). Nothing could be clearer than the effect of the words imposing on the Court the obligation to record a conviction and order the offender to serve a term of imprisonment in the prescribed circumstances. Appreciating in each case that the preconditions have been established to bring S 78A into operation, the sentencing court will have regard to it and proceed as directed. If the circumstances of the offence and the offender justify the imposition of a sentence in excess of the minimum prescribed, then no doubt the court will pay due regard to the matters referred to in subs(2) of s5 of the *Sentencing Act* in the exercise of its discretion, but in so far as the prescribed minimum is in excess of the term which would otherwise be imposed, then those provisions do not fall to be considered. Many of the discretions in the court such as to proceed without conviction under ss 10 and 11, to discharge an offender after conviction, s12, or to release the offender on a bond following conviction, s13, are not available nor may a fine be imposed, s15, or an order made for community service, s34. The question of hospital orders under s80 requires special consideration later. However, the ability of the Court to exercise some of the discretionary mitigatory provisions, such as to wholly or partly suspend the sentence to a term of imprisonment or, in appropriate circumstances, to fix a non parole period are not affected by s 78A, standing alone. It ensures no more than that

the offender suffers the recording of a conviction and an order that he serve a term of imprisonment, orders which nevertheless may have significant impact upon the offender.

Turning to s 78B, subs(1) makes it clear that the Court may make a punitive work order in addition to the order required to be made under s 78A. The combination of s 78A and the provisions relating to punitive work orders together work the Parliament's intention that there shall be greater punishment imposed upon many people who commit property offences. The court having made an order for imprisonment under s 78A may also require the offender to be subjected to the punitive work order. It was then necessary to ensure that the court's general discretionary powers were not affected by reason of the specific mention of the making of a punitive work order; orders for compensation and restitution under Part V are obvious examples.

The power in s 78B(1) is expressed to be a power to make orders in addition to those "required to be made under section 78A" and questions arise as to whether the order "required to be made under section 78A" is the order that the offender serve a term of imprisonment, or a term of imprisonment of the minimum prescribed, or any term. If the order "required to be made" under s 78A is that to serve the term of imprisonment fixed, regardless of the period, then s 78B(1) and (2) apply to the whole of that term. On the other hand, if the "order required to be made" in s 78B(1) is for the minimum term

of imprisonment prescribed in each case, then the "order referred to" mentioned in subs(2) is any order capable of being made in addition to that order. Accordingly, subs(2) would only constrain the Court's powers to make an additional order in respect of an order that the offender serve a term of imprisonment for the minimum prescribed period, but not if the order imposed a term of imprisonment in excess of the minimum. That leads to the possibility that people who would have normally received a lesser penalty than a sentence to a term of imprisonment, or a sentence to a term of imprisonment less than the minimum prescribed will not only be sentenced to a term of imprisonment for the minimum, but will not be able to receive any mitigation of that sentence by way of suspension etc. The least culpable would be the worst affected. I do not think that that intention should be attributed to the Parliament. It follows that the "order required to be made under section 78A" appearing in s 78B(1) means any order that the offender serve a term of imprisonment regardless of the term. The preconditions operating to invoke the operation of s 78A being established, and the order that the offender serve a term of imprisonment having been made, the fixing of the term is only a quantification of the order required to be made. In my opinion, that means that all persons coming before the courts charged with property offences, and being found guilty of such charges, would be dealt with on a more even handed basis. Whether the term of imprisonment imposed is the minimum, by operation of the Act or by exercise of discretion, or in excess of the minimum in the exercise of discretion, whatever constraints are imposed by s 78B(2)

apply to all. No distinction can be drawn between the words "order required to be made under section 78A" in s 78B(1) and the words "ordered under 78A" appearing in s 78B(2).

What then is the effect of s 78B(2)? There are a variety of additional orders which might be made pursuant to the powers in s 78B(1) for example, under Part V of the Act. The constraint is upon the making of an order in addition to the order that the offender serve a term of imprisonment "if its effect would be to release the offender from the requirements to actually serve the term of imprisonment ordered under section 78A". There can be no doubt that the phrase "actually serve the term of imprisonment" means that the offender is to go to prison for the whole of the term of imprisonment ordered to be served. The word "actually" denotes as an actual or existing fact or reality, as opposed to something being deemed to be what it is not. The subsection looks to achieving an end result, to prohibit the exercise of some of a court's powers. The only way in which that result might be confined would be to construe the subsection as only preventing a court from making an order the effect of which would be to definitely release the offender from the requirement. However, there is no provision in the *Sentencing Act* whereby a court could absolutely release a prisoner from the requirement to actually serve a term of imprisonment by way of an order made in addition to the order imposing that sentence. A court can, however, make orders which could possibly have the effect of releasing the offender from the requirement. The

making of a order wholly or partly suspending a sentence, with or without conditions, including an order for home detention and the fixing of a non-parole period, would not necessarily have the effect of releasing the offender from the requirement to actually serve the term of imprisonment, but, might have that effect. Depending upon the performance of the offender during conditional liberty, he or she could be effectively released from the requirement to actually serve the term of imprisonment. There are means by which an offender under a suspended sentence or on parole might be taken into custody and sent to prison, but to suggest that it is only at that latter stage that a court is inhibited from doing other than to order the offender to go to prison for the whole of the term originally imposed is to place a constrained construction upon the legislation (as to suspended sentence see ss 41 and 43, and as to parole, ss 5 and 14(1) *Parole of Prisoners* Act (NT) (1971)).

Meaning must be given to s 78B(2), it can not be treated as void notwithstanding difficulties in construction. The plain intention of the Parliament, the object of the legislation, can not be defeated by holding the words uncertain or of no effect. In this case, and for the reasons given, the object of s 78B(2) will be achieved if the word "would" is read as meaning "could" or "may", or if the word "release" was not regarded as being used only in any absolute sense, but so as to imply a conditional release.

During the course of considering the submissions in this matter and consideration of the Act as a whole, I have been troubled by the effect, if any, of ss 78A and 78B on s80, Hospital Orders. The issue was not argued in detail before the Court, but it seems to me that where s 78A is brought into operation it may not be open to the Court, in the case of a person found guilty and appearing to be suffering from a mental illness to invoke the humane system for diagnosis and treatment envisaged in Part 4. The only sentence which can be imposed under s 78A is an order that the offender serve a term of imprisonment. A sentence by ordering a person to be dealt with under s80, is not a sentence to imprisonment in the sense in which that word is used in the Act (see, for example, s80(4)(b)). A Hospital Order does not seem to be within the meaning of an "additional order" used in relation to an order under s 78A.

I would answer the amended questions in the same manner as proposed by Angel J.

> "Whether upon the true construction of ss 78A and 78B of the *Sentencing Act*, a Court is precluded from:
>
> (a) making orders wholly or partially suspending a term of imprisonment ordered to be served under s 78A;
>
> ANSWER: Yes, whatever the length of sentence ordered under s 78A.

(b) making an order suspending a term of imprisonment ordered to be served under s 78A upon the offender entering into a home detention order;

ANSWER Yes, whatever the length of sentence ordered under s 78A.

(c) fix a period during which an offender ordered to serve a sentence of imprisonment under s 78A is not eligible to be released on parole.

ANSWER Yes, whatever the length of sentence ordered under s 78A."

ANGEL J

Pursuant to s162 of the *Justices Act* (NT) the learned Chief Magistrate stated a special case. The question of law upon which the case was stated was:

> "Whether, on a true construction of s 78A of the *Sentencing Act*, the phrase 'order the offender to serve a term of imprisonment', (thrice used) precludes the making of further orders suspending the term wholly or partly, or suspending the term on the offender entering into a Home Detention Order?".

That question came before this Court upon referral by a judge pursuant to s21 of the S*upreme Court Act* (NT). Before this Court the arguments were wide ranging. The question raised matters central to the operation of the amendments to the *Sentencing Act* (NT) which amendments came into operation on 8 March 1997. The answer to the question as framed raised questions of construction of not only s 78A but also s 78B. As a consequence

of the arguments the question was amended with a view to covering the arguments. The question was recast as follows:

> "Whether upon the true construction of ss 78A and 78B of the *Sentencing Act*, a Court is precluded from:
>
> (a) making orders wholly or partially suspending a term of imprisonment ordered to be served under s 78A;
>
> (b) making an order suspending a term of imprisonment ordered to be served under s 78A upon the offender entering into a home detention order;
>
> (c) fix a period during which an offender ordered to serve a sentence of imprisonment under s 78A is not eligible to be released on parole.
>
> and in each case where the sentence ordered to be served is:
>
> (i) the minimum fixed by s 78A, or
>
> (ii) a period in excess of the minimum fixed by s 78A.".

Sections 78A and 78B are as follows:

"78A IMPRISONMENT FOR PROPERTY OFFENDERS

(1) Where a court finds an offender guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days.

(2) Where a court finds an offender guilty of a property offence and the offender has once before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 90 days.

(3) Where a court finds an offender guilty of a property offence and the offender has 2 or more times before been found guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 12 months.

(4) Where an offender is found guilty of more than one property offence specified in the same information, complaint or indictment, the findings of guilt are, for the purposes of this section, to be taken as a single finding of guilt, whether or not the offences are the same.

(5) Where an offender is found guilty of more than one property offence as part of a single criminal enterprise, all the property offences are together a single property offence for the purposes of this section, whether or not the offences are the same.

(6) Where an offender is found guilty of a property offence, the offence is to be taken into account for the purposes of subsection (2) or (3) whether it was committed before or after the property offence in respect of which the offender is before the court.

78B ADDITIONAL ORDERS FOR PROPERTY OFFENDERS

(1) In addition to the order required to be made under section 78A, the court may make a punitive work order or any other order it may make under this Act.

(2) An order referred to in subsection (1) cannot be made if its effect would be to release the offender from the requirement to actually serve the term of imprisonment ordered under section 78A.".

In approaching the construction of these sections I remind myself that "...doubtless no form of words has ever yet been framed by human ingenuity with regard to which some ingenious counsel could not suggest a difficulty ...", per Cave J in *Pratt v South Eastern Railway Co* [1897] 1 QB 718 at 721, and that it is not for judges to invent fancied ambiguities: see per Lord Diplock in *Duport Steel v Sirs* [1980] 1 WLR 142 at 157. As Lord Simonds said in *Kirkness v John Hudson & Co Ltd* [1955] AC 696 at 712:

> "Each one of us has the task of deciding what the relevant words mean. In coming to that decision he will necessarily give great weight to the opinion of others, but if at the end of the day he forms

> his own clear judgment and does not think that the words are 'fairly and equally open to divers meanings' he is not entitled to say that there is an ambiguity. For him at least there is no ambiguity and on that basis he must decide the case.".

The statement of Gibbs CJ in *Sillery v The Queen* (1981) 180 CLR 353 at 357, viz "If it is intended to provide a mandatory penalty, clear words can and should be used", and the reasons for judgment of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen* (1994) 179 CLR 427 at 436-437, do not alter this fundamental task.

Sections 78A and 78B appear under the following heading -

"Division 6 - Custodial Orders for Property Offenders

Subdivision 1 - Compulsory Imprisonment"

which is part of the legislation for interpretative purposes, s55(1) of the *Interpretation Act*. Thus it can be taken into consideration in determining the meaning of ambiguous provisions and may sometimes be of service in determining the scope of a provision, always provided that where the enacting words are clear and unambiguous the title or headings are to be disregarded and full effect given to the unambiguous enactment: see *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 16.

Section 78A provides that where a court finds an offender guilty of a property offence the court shall record a conviction and order the offender to

serve a term of imprisonment of not less than a specified period. For a first offence the period specified is fourteen days, for a second offence ninety days and for a third or subsequent offence twelve months. Section 3(1) provides that a property offence means an offence specified in Schedule 1. That Schedule specifies, by reference to various sections of the *Criminal Code*, a number of offences carrying a maximum penalty ranging from twelve months to life imprisonment.

Section 78A is mandatory in its terms. Once a finding of guilt has been made, the sentencing court is bound to record a conviction and order the offender to serve a term of imprisonment of not less than the specified period. The minimum term of imprisonment to be ordered is that specified in s 78A. The maximum term of imprisonment is that specified in the particular section of the *Criminal Code* relevant to the charge. On its face, s 78A does not exclude the operation of other provisions of the *Sentencing Act* whereby, for example, the term of imprisonment might be suspended. The question is whether s 78B provides that such an order can not be made.

Section 78B(1) provides that in addition to the order required to be made under s 78A, the court may make a punitive work order or any other order it may make under the Act. By virtue of s 78B(2)an order referred to s 78B(1) cannot be made "if its effect would be to release the offender from the requirement to actually serve the term of imprisonment ordered under s 78A".

I am of the opinion that an order suspending a term of imprisonment ordered under s 78A would have the effect of releasing the offender from the requirement in fact to serve that term of imprisonment.

A sentence of imprisonment commences on the day it is imposed unless the offender is not then in custody in which case it commences on the day the person is apprehended under a warrant of commitment issued in respect of the sentence: s62(1). This is so unless a sentence is backdated pursuant to s62(5). Save for orders made on the hearing of an appeal, a court can only impose a term of imprisonment under Part 3, upon an offender who is present before the court, s117; thus from the moment it is announced the sentence commences to run. Thereafter to order that the sentence be suspended, notwithstanding that it remains a sentence of imprisonment, ss 40(5) and (8), is to release the offender from the requirement to serve the term of imprisonment then running. A conditional release is nonetheless a release, and I am of the opinion s 78B means that an offender can not at the time of passing the sentence be ordered such that he does not in fact have to serve the term of imprisonment, which term is on foot and has run from the time it was first imposed.

This conclusion is supported by the fact that a person in respect of whom a suspended sentence has been imposed under s40 only has to serve the sentence, or part of the sentence, if ordered to do so under s43; see s41. In my

view the position in relation to home detention orders is the same because a home detention order is predicated upon an order suspending the sentence and so s41 equally applies.

In the course of submissions some concern was expressed that s 78B(2) in so far as it refers to "the term of imprisonment ordered under s 78A" would require that any order for imprisonment made pursuant to s 78A whether of the minimum stipulated period or greater would need to be served. It was said that this was a manifest absurdity, that it was manifestly unjust, and that it was capricious and irrational and that s 78B(2) should be construed to avoid any such conclusion. It was said that s 78B(2), so construed, was so draconian that Parliament's intention must have been otherwise.

As Mildren J has pointed out, mandatory sentences by their very nature are unjust in the sense that they require courts to sentence on a basis regardless of nature of the crime and the particular circumstances of the offender; cf *Palling v Corfield* (1970) 123 CLR 52 at 58, per Barwick CJ; *Cobiac v Liddy* (1969) 119 CLR 257 at 269, per Windeyer J. What ever else may be said about these provisions, Parliament, it appears, intended that courts impose the blunt instrument of imprisonment in lieu of other sentencing dispositions which might more truly reflect the circumstances of the offence and of the offender, in the hope or expectation of lessening property offences, and, perhaps, of making victims feel better - about something. However I see

nothing in these provisions to indicate that s 78B(2) was intended to require an offender only to serve the minimum term referred to in s 78A. We are to construe the words used, not surmise as to the size of the bludgeon. In their natural meaning the words "the term of imprisonment ordered under s 78A" may be the minimum term or more. They mean the order in fact made. In my opinion the result of this construction of s78B is not so strange that it can be said the intention of Parliament must be otherwise. The sections are under the heading "Compulsory Imprisonment" not "Minimum Compulsory Imprisonment". Nor in my opinion does it assist to call such a result a "manifest absurdity" or a "manifest injustice" or "capricious", or "irrational", or "an obvious mistake" to use expressions sometimes referred to in the authorities. As Lord Macnaughten said in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 118

> "Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.".

See, too, *The Engineers*' case (1920) 28 CLR 129 at 142, 143 per Knox CJ, Isaacs, Rich and Starke JJ.

For my part I see no warrant and can see no reason to imply or read words into s 78B(2) which do not appear there. No implication of additional words are suggested by the words the legislature has used in s 78B(2). Nor in my view can it be said to be clear or obvious or reasonable or necessary to imply or read additional words into that section. As Lord Mersey said in *Thompson v Goold & Co* [1910] AC 409 at 420 "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."; and as Lord Loreburn LC said in *Vickers, Sons & Maxim Ltd v Evans* [1910] AC 444 at 445 "... we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.".

While I agree that on a proper construction of s 78B(2) the fixing of a non-parole period would not in itself have the effect of releasing the offender from the requirement "to actually serve" the term of imprisonment ordered under s 78A, given that an offender is intended "to actually serve" (to refer to the legislature's split infinitive again) the term of imprisonment ordered under s 78A, that circumstance, ipso facto, makes the fixing of a non-parole period "inappropriate", for the purposes of s53(1). The operation of sz 78A and 78B(2) denies the operation of a parole period. The fixing of a non-parole period in respect of a term of imprisonment imposed with respect to a property offence would be a non sequitur. So, for all practical purposes the answer to the third question is "Yes".

Finally I would mention that we were invited to look at the Minister's Second Reading Speech as an aid to interpretation of these new amendments. There is no statutory provision in the Northern Territory which permits the court to have recourse to this type of material as there is in other jurisdictions. Having reached the conclusion I have it is not necessary to decide whether as a matter of general principle and in the absence of express statutory authority, this Court can consider the Second Reading Speech as an aid to statutory interpretation ie as to the meaning of the enactment, as opposed to identifying a mischief, cf *Salmon v Chute and Dredge* (1994) 4 NTLR 149 at 164-65 and *Maynard v O'Brien* (1991) 78 NTR 16 at 19, 20. In jurisdictions where there is express statutory authority to refer to such materials there is nevertheless an important limitation upon the use which can be made of such material in a context such as the present. In *Bolton & Anor; Ex parte Beane* (1987) 162 CLR 514 at 518 Mason CJ, Wilson and Dawson JJ said, in relation to a Minister's Second Reading Speech:

> "But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.".

I would answer the amended questions stated as follows:

> "Whether upon the true construction of ss 78A and 78B of the *Sentencing Act*, a Court is precluded from:
>
> (a) making orders wholly or partially suspending a term of imprisonment ordered to be served under s 78A;
>
> ANSWER: Yes, whatever the length of sentence ordered under s 78A.
>
> (b) making an order suspending a term of imprisonment ordered to be served under s 78A upon the offender entering into a home detention order;
>
> ANSWER: Yes, whatever the length of sentence ordered under s 78A.
>
> (c) fix a period during which an offender ordered to serve a sentence of imprisonment under s 78A is not eligible to be released on parole.
>
> ANSWER: Yes, whatever the length of sentence ordered under s 78A.

MILDREN J

Courts are often described as "Courts of Justice", and Judges are entitled "Justices", because it is fundamental that, above all, they are expected to dispense justice equally to all those who come before them, without fear or favour, and according to law.

It is a principle of law that it is the fundamental duty of sentencing courts when imposing punishment for breaches of the criminal law not to impose a punishment which exceeds that which justice demands in all the circumstances. In the *Great Charter of King John* (1215) (*Magna Carta*), it provided:

> *"Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti; et pro magno delicto, amercietur secundum magnitudinem delicti.."*[1]

The same principle was recognised in the *Bill of Rights 1688*: *"Excessive baile ought not to be required nor excessive fines imposed nor cruell and unusual punishments inflicted."* S 5(1)(a) of the *Sentencing Act* reflects this principle.[2] I consider it appropriate to regard this duty as carrying with it a corresponding fundamental right enjoyed by every citizen, a right which he may protect by appealing to a higher court if this right is infringed. The same right is enjoyed by the State which is the embodiment of the people, and the Director of Public Prosecutions can also appeal if justice is denied by too lenient a sentence.

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the

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[1] "A free-man shall not be amerced for a small offence, but only according to the degree of the offence; and for a great delinquency, according to the magnitude of his delinquency .." see *Magna Charter,* The Legal Classics Library, Special Edn., 1982, pp 74-75. These words were repeated in the First, Second and Third Great Charters of Henry 111 and in the First Great Charter of King Edward I: see *Magna Charter*, op. cit., pps 110, 123, 136,150.

[2] S 5(1)(a) provides:
"(1) The only purposes for which sentences may be imposed on an offender are-
(a) to punish the offender to an extent or in a way that is just in all the circumstances..."

prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

The provisions of ss 78A of the *Sentencing Act* which we are called upon to construe, provide in essence that upon finding an offender guilty of a certain type of offence defined as a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days for a first property offence, not less then 90 days for a second property offence, and not less than 12 months for a third (or more) property offence. It was not contended in these proceedings that the Legislative Assembly has no power to enact a scheme whereby offenders must be sent to prison by the courts regardless of the circumstances of the offence or of the offender, nor that the Administrator may not give his assent to such an enactment even if the consequences of such a scheme will give rise to injustice.

The provisions of s 78A apply only to a "property offence", which is defined by s 3 to mean an offence specified in Schedule 1. The offences contained in the Schedule are mostly serious crimes for which significant maximum penalties are prescribed: (1) certain types of stealing, 7 years (s 210); robbery, 14 years (s 211(1)); armed robbery, and robbery in company, life (s 211(2)); assault with intent to steal, 7 years (s 212) or if accompanied by circumstances of aggravation, 14 years or life (ss 212(2) and (3)); aggravated unlawful entry into buildings, up to life depending on the

circumstances of aggravation (s 213); unlawfully taking control of aircraft, 7 years to 14 years (s 216); corruptly receiving or obtaining money to help a person recover property obtained by means of a crime, 7 years (s 231); aggravated criminal damage to property, 7 years to life,(ss 251(2) and (4)). In all but very exceptional cases, the usual punishment for offences such as these would be terms of actual imprisonment in any event. But the Schedule also contains offences which are simple offences, where the maxima are significantly less: see s 213(2); s 214(1); s 218(1); s 251(1). The range of maxima for these offences is 1 to 2 years, and in respect of these offences, terms of actual imprisonment are not usually imposed, except on repeat offenders.

The possibility therefore remains that, upon a conviction for a simple offence for which the maximum penalty is only 1 year, the court will, if the individual has two previous convictions for property offences, be obliged to record a conviction and impose a minimum penalty of 12 months imprisonment even though the two prior convictions occurred many years ago, the offender has led a blameless life in the meantime, and the offence itself was trivial, technical or minor such as would warrant the dismissal of the charge entirely pursuant to s 10, or release upon a bond pursuant to s 11, without recording a conviction; or an unconditional discharge pursuant to s 12, or release upon a bond pursuant to s 12, upon the recording of a conviction. There appears from the language of s 78A and s 78B no power in the court to exercise leniency, mercy or to impose otherwise than a plainly unjust sentence in such case, not even if the case involved exceptional circumstances.

In a paper presented at the 19th Australian Legal Convention on 7 July 1977,[3] Professor Norval Morris described this type of sentencing scheme, which was fashionable then in certain of the American States, as follows:

> "MANDATORY MINIMUM SENTENCES
>
> This is the most extreme form of legislative limitation of judicial discretion - a fixed term or a fixed minimum term for a defined crime. A popular example is the minimum of a five-year sentence for anyone carrying a gun at the time of the commission of a felony. Legislation of this kind is unprincipled and morally insensible; it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy. It is based on an absurd belief in the sentimental leniency of the judiciary, a belief fostered by some elements of the press in the United States.
>
> Nevertheless, recently it has become politically fashionable to demand the imposition of such stringent limits upon sentencing discretion, and in many jurisdictions statutory provisions for mandatory sentencing have already been adopted. In practice, such provisions have always met with non-enforcement and nullification. This is neither surprising nor deplorable. It is not surprising because the pervasive influence of plea bargaining inevitably insures the reduction of charges for offences carrying severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purposes of punishment make sentencing discretion essential. The enforcement of arbitrary penal equations is both irrational and inequitable.
>
> In fact, the attempt to eliminate sentencing discretion results in its being transferred from the judge to the prosecutor, who exercises such discretion in the process of charge and plea negotiation. In an overcrowded court system, it is as though discretion were like matter, the quantity of which Helmholtz described as "eternal and unalterable"; it cannot be destroyed, it can only be displaced.
>
> Profession Remington reports that "in Detroit during the 1950s, state statutes prohibited probation for burglary in the night-time

[3] *Sentencing and Parole* (1977) 51 ALJ 523 at 529.

> and imposed a significant, mandatory minimum sentence for armed robbery. In practice,... burglaries committed after dark resulted in pleas to daytime burglary, and ... robberies committed with a gun ended up as pleas of guilty to unarmed robbery. So common was the practice that the Michigan Parole Board would often start the interview with 'I see you were convicted of unarmed robbery in Detroit. What caliber of gun did you use?' Without even a smile, the inmate would respond 'A .38 caliber revolver'."
>
> There is no lesson for Australian lawyers to learn from the American flirtation with mandatory minimum sentences except to take heed of that shocking example of routine hypocrisy."

In these circumstances, it is not surprising that the courts have adopted a strict approach to the interpretation to be given to legislation which imposes mandatory minimum penalties. In *Cobiac v Liddy* (1969) 119 CLR 257 at 269, Windeyer J said:

> "The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy. The more strict a rule is made, the more serious become the consequences of breaking it, the less likely it may be that Parliament would intend to close all avenues of exception. Especially when penalties are made rigid, not to be reduced or mitigated, it might seem improbable that Parliament would not retain a means of escaping the imposition of a penalty which must follow upon conviction, that it would abolish it, not directly but by a side wind. This is not because mercy, in Portia's sense, should season justice. It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice. Therefore, I do not think it should be said that the Parliament of South Australia has done by implication what it certainly has not done explicitly ..."

For these reasons, I consider that the correct approach to the question of statutory interpretation which falls to be considered in this case is to be found

in the principles expounded by Mason CJ., Brennan, Gaudron and McHugh JJ in *Coco v The Queen* (1993-4) 179 CLR 427 at 437-4:

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.
>
> So long as the requirement for express statutory authorisation is understood in the sense explained above, we would accept the requirement as a correct statement of principle. At the same time, in our view, the principle was expressed more simply by Brennan J. in *Re Bolton; Ex parte Beane* in these terms:
>
> > "Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation."
>
> In *Bropho v Western Australia*, Mason C.J., Deane, Dawson, Toohey, Gaudron and McHugh JJ. pointed out that the rationale against the presumption against the modification or abrogation of fundamental rights is to be found in the assumption that it is:
>
> > "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used'."

> At the same time, curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.
>
> The need for a clear expression of an unmistakable and unambiguous intention does not exclude the possibility that the presumption against statutory interference with fundamental rights may be displaced by implication. Sometimes it is said that a presumption about legislative intention can be displaced only by necessary implication but that statement does little more than emphasize that the test is a very stringent one. As we remarked earlier, in some circumstances the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope."

Applying these principles to the provisions of ss 78A and 78B, it is clear the s 78A does not, by its express terms, preclude the making of an order suspending a sentence of imprisonment or for home detention. In any event, such orders would be permitted by the provisions s 78B(1), which provides that: "in addition to the order required to be made under s 78A(1), the Court may make a punitive work order or any other order it may make under the Act."

The submission of the Director of Public Prosecutions, Mr Wild Q.C., is that such orders are prohibited by s 78B(2) which provides:

> "An order referred to in subsection (1) cannot be made if its effect would be to release the offender from the requirement to actually serve the term of imprisonment ordered under s 78A."

The difficulty with this submission is in the expression "would be to release." The word "release" may or may not, include a conditional release. The expression "would be" contemplates that which is certain to occur, rather than that which only may happen. There is no specific provision of the *Sentencing Act* which provides that the effect of an order suspending a sentence of imprisonment or for home detention releases the offender from the requirement to actually serve the sentence imposed. If that is the effect of those kinds of orders, it arises only by implication. True it is that s 41 provides that "an offender in respect of whom a suspended sentence has been imposed under s 40 has to serve the sentence or part sentence held in suspense only if he or she is ordered to do so under section 43." But if no order is made under s 43, the Act does not provide that the offender is "released" from having to serve the sentence. The alternative possibilities are that the sentence remains in suspense forever, or it is deemed to have been served whilst the offender was on conditional liberty. Given that the provisions of ss 40(5) and (8) deem fully suspended and partly suspended sentences to be sentences of imprisonment for the purposes of the *Sentencing Act*, the provisions of s 62(1) which provide that a sentence of imprisonment commences on the day it is imposed unless the offender is not then in custody, the fact that in almost every case, whenever a sentence of imprisonment is imposed whether suspended or not, or a home detention order is made, the offender will then be in custody even if he had been on bail previously, it can hardly be said, notwithstanding the use of the word "actually" in s 78B(2), that the legislature has spoken with unmistakably clarity. The position is even less

clear in the case of home detention orders. S 41 does not apply to home detention orders, (although it may actually apply to the order suspending the sentence upon which the home detention order is predicated) and there is no provision providing that an offender who complies with the conditions of the order is "released" from having to actually serve the sentence of imprisonment imposed, but held in suspense.

It is also pertinent to observe that the literal meaning of s 78B(2), if the construction contended by Mr Wild Q.C. is correct, would appear to carry with it the consequence that an order for imprisonment which exceeds the minimum periods contemplated by s 78A could not be partially suspended, even if the court ordered that the prisoner be committed to prison for the minimum period. It would be surprising, to say the least, if this was intended by the legislature.

Counsel for the respondent, Mr Wyvill, submitted that ss 78A and 78B were meaningless. I do not accept this contention. It is a well-established rule that courts have no power to declare the provisions of an Act void for uncertainty, no matter how difficult the provision may be to interpret: see *Pearce and Geddes, Statutory Interpretation in Australia*, 4th Edn., para 2.12. Mr Wyvill's alternative submission was that the provisions did not in clear and unambiguous language provide that suspended sentences and home detention orders could not be imposed, and therefore, even if it meant that s 78B(2) had no work to do, s 78B(2) could not be interpreted to have this result. I do not accept this submission. In particular, I do not consider that *Sillery v The*

Queen (1981) 180 CLR 353 is authority for the proposition that the courts must construe ambiguous provisions in an Act imposing mandatory minimum sentences in favour of the liberty of the subject if the consequence of that construction would be to deprive the provision of all meaning, as Mr Wyvill submitted. The provision to be construed in that case did not involve that consequence. On the other hand, as the passage quoted from *Coco v The Queen*, supra, shows, if s 78B(2) has an operation, albeit limited in scope, which is consistent with the power to impose a suspended sentence or home detention order, that will be the preferred construction.

Mr Wyvill submitted that the construction contended for by the respondent would still leave ss 78B(2) with some limited work to do in relation to hospital orders made pursuant to s 80. There are two difficulties with this submission. First, such a consequence would be as unjust as the lack of a power to suspend a sentence or to impose a home detention order. Secondly, the provisions of s 80 indicate that the intention of the legislature is that time spent in detention pursuant to hospital orders is to be treated as the equivalent of time spent in actual custody: see ss 80(4)(b), (5), (6). It may be that in cases to which s 81(3) refers, the court would not be able to reduce the term of imprisonment below the minimum by deducting the period of hospital detention from the minimum term, but if this is so, that is a consequence of s 78A and not s 78B(2).

Having carefully considered the provisions of the Act, and with very considerable reluctance and hesitation, I am driven to the conclusion that the construction contended for by the respondent would have the result of depriving s 78B(2) of all meaning. I therefore conclude that the words "if its effect would be to release the offender from the requirement to actually serve the term of imprisonment" in the subsection should be read as "may be to release". Read in this way, and construing "release" to include "conditionally release" there is no doubt that an order suspending a term of imprisonment either wholly or partially, or upon a home detention order, may have that effect, even if the terms of the order are complied with by the offender.

On the other hand, I do not consider that s 78B(2) should be construed as precluding a court from suspending so much of a term of imprisonment as exceeds the minimum term. I do not consider that the legislature intended to do this. I concede that to avoid this consequence it requires inserting into s 78B(2) words which are not there, namely the words italicized by me and appearing in the phrase "*so much of* the term of imprisonment *required to be* ordered under section 78A". The provisions of s 78A and s 78B do not clearly and unambiguously provide that in all circumstances a court is prohibited from imposing a suspended or partly suspended sentence. The purpose of these provisions is to impose mandatory minimum sentences, not to restrict the court's sentencing powers when sentences in excess of the prescribed minima are considered by the court to be appropriate. It is possible to read the provisions of s 78A and 78B as having no application at all in such circumstances, so that, in such a case, a court could suspend the whole

sentence including the mandatory minimum term. However, having regard to s 5(2)(a) of the Act, I am satisfied that that result would be incongruous, capricious and absurd. In these circumstances it is appropriate to read into s 78B(2) the missing words I have suggested: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980-81) 147 CLR 279.

Finally, I consider that ss 78A and 78B do not preclude a court from fixing a non-parole period in an appropriate case. The requirement to fix a non-parole period is mandatory, if the head sentence is for a period of 12 months or longer, save where there is a sentence of life imprisonment for the crime of murder. However the courts retain a discretion not to fix a minimum term where "the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate": see s 53(1). The use of the word "may" in s 78B(1) indicates that the type of orders contemplated by s 78B(1) and (2) are discretionary orders, not mandatory orders. Further, the fixing of a non-parole period is not an order that may have the proscribed effect. All that such an order does is to fix a time before the expiration of which a prisoner is not eligible to be released on parole by the Parole Board. Thereafter, the Board may, in its discretion, order that the prisoner be released from prison on parole: see *Parole of Prisoners Act*, s 5(2). Thus, in the case of a person receiving a minimum sentence of 12 months imprisonment in accordance with s 78A(3), the court is required to fix a non-parole period of at least 8 months (s 54(2)) unless it considers, in accordance with s 53(1), that it is inappropriate to do so; but it cannot be said that the fixing of that period may have the effect of

releasing the prisoner from the requirement to actually serve the period of 12 months. The court's order can have no such effect; all it does is to establish a condition precedent upon which the Parole Board may or may not act upon in its absolute discretion.

Accordingly, I would answer the amended stated case as follows:

(a) (i) yes;

(ii) yes, but only in respect of so much of the sentence as is the minimum period required by s 78A;

(b) (i) yes;

(ii) yes, but only in respect of so much of the sentence as is the minimum period required by s 78A;

(c) (i) no;

(ii) no.